

[Cite as *State v. Elko*, 2009-Ohio-3462.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91929

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JEFFREY ELKO

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-437173

BEFORE: Sweeney, J., Cooney, A.J., and Blackmon, J.

RELEASED: July 16, 2009

JOURNALIZED:

FOR APPELLANT

Jeffrey Elko, pro se
Inmate No. 453-425
Mansfield Correctional Institution
P.O. Box 788
Mansfield, Ohio 44901

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
BY: T. Allan Regas
Assistant Prosecuting Attorney
1200 Ontario Street
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Jeffrey Elko (“defendant”), appeals, pro se, his reclassification as a Tier III sex offender under Ohio’s version of The Adam Walsh Child Protection and Safety Act of 2006 (“the AWA”). After reviewing the facts of the case and pertinent law, we affirm.

{¶ 2} On September 3, 2003, defendant pled guilty to charges of kidnapping, sexual battery, and felonious assault. The court sentenced him to six years in prison and classified him a sexually oriented offender, which, at the time, was the least restrictive classification of sex offenders under former R.C. Chapter 2950.

{¶ 3} On November 30, 2007, the State sent defendant a letter stating that beginning January 1, 2008, he would be reclassified as a Tier III sex offender under the AWA, which is the most restrictive classification of sex offenders, in terms of registration and reporting requirements.

{¶ 4} On February 13, 2008, defendant filed a “motion to set aside judgment of conviction and permit the defendant to withdraw his guilty plea to correct manifest injustice,” which challenged the retroactive application of the AWA as unconstitutional. On July 16, the court denied defendant’s motion.

{¶ 5} Defendant appeals this denial and raises two assignments of error for our review, which we will address together.

{¶ 6} “I. Where the trial court classifies the appellant as a sexually oriented offender requiring address registration and verification annually for ten (10) years,

the subsequent reclassification of appellant as a Tier III sex offender requiring more frequent registration, a longer period of registration, and more disclosure at registration is unconstitutional and violates the ex post facto clauses of the Ohio and United States Constitutions.

{¶ 7} “II. Where the appellant [pled] guilty in exchange for a favorable classification with annual registration for ten (10) years, and ‘no’ community notification provisions, reclassification to Tier III sex offender which requires more frequent registration, a longer period of registration, and more disclosure at registration constitutes an impairment of an obligation of contract prohibited by Section 28, Article III of the Ohio Constitution and Article I, Section 10, Clause 1 of the United States Constitution.”

{¶ 8} Sua sponte, we raise the issue of procedural deficiencies in defendant’s challenge to his reclassification.

{¶ 9} Revised Code 2950.031(E) governs offenders’ challenges to reclassification under the AWA, and states in pertinent part that an offender who is subject to reclassification “may request as a matter of right a court hearing to contest the application *** of the new registration requirements ***.” To request the hearing, the offender “shall file a petition with the court *** of common pleas” within 60 days after the offender received notice of the reclassification.

{¶ 10} “If the offender *** requests a hearing by timely filing a petition ***, [t]he court shall schedule a hearing, and shall provide notice to the offender *** and prosecutor of the date, time, and place of the hearing.

{¶ 11} “***

{¶ 12} “If an offender *** fails to request a hearing in accordance with this division ***, the failure constitutes a waiver by the offender *** of the offender’s *** right to a hearing under this division, and the offender *** is bound by the determinations of the attorney general contained in the registered letter sent to the offender ***.”

{¶ 13} In the instant case, defendant failed to request a hearing in accordance with R.C. 2950.031(E), which is an issue of first impression for this Court. Additionally, we could find no other Ohio appellate court that has ruled on similar procedural aspects of contesting AWA reclassifications.

{¶ 14} Given the plain language of the statute, we hold that defendant’s failure to request a hearing is fatal to challenging his Tier III offender status under the AWA. Without addressing defendant’s two assignments of error, we overrule them as moot and sua sponte affirm the trial court’s denial of defendant’s motion to set aside judgment.

Judgment affirmed.

It is ordered that appellee recover from appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, JUDGE

COLLEEN CONWAY COONEY, A.J., and
PATRICIA A. BLACKMON, J., CONCUR